

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 18-2421 (RC)

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this status report pursuant to the Court's minute order of January 30, 2019.

Introduction

1. At issue are two Freedom of Information Act (FOIA) requests submitted by Plaintiff to Defendant, the U.S. Department of Justice (DOJ), on August 30, 2018, seeking records relating to the Federal Bureau of Investigation (FBI) Headquarters Consolidation Project. Plaintiff filed the Complaint on October 23, 2018, ECF No. 1; Defendant filed its Answer on December 7, 2018, ECF No. 7.

2. As previously reported, the parties are discussing the requests and Defendant's plan to search for potentially responsive records. On February 1, 2019, Defendant sent an email to Plaintiff regarding Defendant's plan for processing the two FOIA requests, including search terms to be used. On February 4, 2019, Plaintiff provided Defendant with comments as to Defendant's search terms. On February 13, 2019, Defendant responded to Plaintiff's comments regarding the agency's proposed search.

3. The parties submit separate statements below regarding their respective positions and proposals for moving forward.

Plaintiff's Statement

4. At issue in this matter are two FOIA requests that made clear and specific requests for records related to the federal government's consideration of the relocation of the FBI Headquarters, the "Hotel Communications FOIA" request and the "White House Communications FOIA" request.

5. The parties have reached an impasse regarding the adequacy of Defendant's proposed search for records responsive to Plaintiff's requests. Defendant is refusing to run searches reasonably calculated to identify the records sought by these two requests. Instead, as explained more fully below, Defendant proposes to run a more limited search using proximity searches likely to exclude many responsive records. With respect to the Hotel Communications FOIA request, Defendant's proposed search ignores the plain terms of the request and consequently will not identify the document sought. Likewise, with respect to the White House Communications FOIA request, Defendant's proposed search is inadequate because it ignores Plaintiff's sixteen requested search terms and the proposals are patently incomplete and rely on searching for complex phrases that appear designed to miss relevant records. Furthermore, Defendant has not articulated a reasonable explanation as to why it will not conduct the searches necessary to identify and produce all responsive records.

6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's own FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them." *United States Department of Justice Guide to the Freedom of Information Act*, "Procedural

Requirements” 22 (Sept. 4, 2013),

<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>

(citations omitted).

7. In the “Hotel Communications FOIA,” American Oversight requested two categories of records from the agency from January 20, 2017, through the date of the search. First, Plaintiff requested records reflecting communications from certain specifically identified employees at DOJ (“the DOJ custodians”)¹ and “any individuals associated with the Trump Organization LLC or Trump Hotels, including but not limited to” fifteen named persons and one category of “anyone communicating from an email address ending with” one of four domain names. Compl. ¶ 17. Second, American Oversight requested all records reflecting communications with the identified DOJ custodians “containing [at least one of six] search terms.” *Id.*

8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by the DOJ with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified DOJ personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified DOJ custodians over an identified time period.

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an DOJ employee could reasonably ascertain which agency records are sought and

¹ American Oversight identified three employees by name and title—then-Attorney General Jeff Sessions, Deputy Attorney General Rod Rosenstein, and Assistant Attorney General for Administration Lee Lofthus—and one category of custodians including “anyone communicating on behalf of” the three employees.

locate them. Both components of the request seek communications for a small set of specific DOJ employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in DOJ's own FOIA guide, the DOJ has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified DOJ custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified DOJ custodians and the White House Office from January 20, 2017, through the date of the search. Within that set, Plaintiff requested that the agency search for records that contain one (or more) of sixteen search terms. While this request employs a longer

list of search terms, it seeks a search only of that subset of communications that include both the identified DOJ custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be limited reason for the DOJ custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that the Attorney General and other senior DOJ officials were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and

Defendant is refusing honor the requested method of search. The agency's proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant's proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president's hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. See Compl. ¶ 11 (listing search terms to include "Trump International Hotel," "TIH," "Post Office," and "OPO," among others). None of DOJ's proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies. As another deficiency in the agency's proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, "The White House had no position on FBI consolidation," it is also possible that someone reporting out on the same meeting might say, "Kelly said they had no position on consolidation." American Oversight's requested search would capture the latter communication, but DOJ's proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other

matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

17. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on March 4, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

Defendant's Search Plan for Plaintiff's FOIA Requests

The first FOIA request (OIP Request DOJ-2018-007946, DOJ-2018-008730; JMD # 114860) seeks certain records between specified DOJ officials and persons at the White House regarding the FBI headquarters consolidation project, and Plaintiff suggests sixteen search terms. The second request (OIP Request DOJ-2018-007947, DOJ-2018-008731; JMD # 114861) includes two parts. The first part seeks records between specified DOJ officials and specified Trump Organization officials, and does not expressly limit the search to any specific subject

matter. The second part of this request seeks records to or from specified DOJ officials, does not identify any third parties, and proposes six search terms. Reading each of Plaintiff's initial requests as a whole, DOJ understands that Plaintiff is broadly seeking records related to the FBI Headquarters project and the Trump Hotel or Trump Organization. In response, DOJ will not cast an overly broad net in searching for records as Plaintiff has sought in its initial request and its proposed search terms. Rather, DOJ will craft a reasonably-tailored, dynamic search plan based on and informed by its FOIA expertise and familiarity with the records of the Senior Leadership Offices.

Accordingly, DOJ has initiated a search for these two FOIA requests using the search terms listed below. These terms listed in DOJ's initial search plan reflect many of the suggested search terms included in Plaintiff's two FOIA requests, with proximity search parameters added to better identify records responsive to the subject matter as described by Plaintiff in the two requests. In responding to Plaintiff's requests, it is the sole responsibility of DOJ to craft a search plan and identify relevant records custodians, records repositories, and search capabilities and methods, and it is not for Plaintiff to dictate the terms or methods of the search. Nonetheless, DOJ endeavors to work with requesters and to employ requester input into searches. DOJ has, therefore, worked with Plaintiff's suggestions and has tailored Plaintiff's search terms to most effectively identify records responsive to Plaintiff's two FOIA requests.

- consolidat* w/30 FBI
- renovat* w/30 FBI
- demoli* w/30 FBI
- rebuild* w/30 FBI
- relocat* w/30 FBI
- Trump w/30 FBI
- "post office" w/30 FBI
- OPO w/30 FBI
- JEH w/30 Trump.

Plaintiff has mischaracterized DOJ's initial search plan throughout Plaintiff's Statement. In paragraph 10, Plaintiff alleges that DOJ has limited the number of search custodians, which is not the case. DOJ is searching the requested records custodians in the offices requested by Plaintiff: the Offices of the Attorney General, the Deputy Attorney General, the Assistant Attorney General for Administration, and anyone communicating on their behalf. In paragraph 15, Plaintiff inaccurately represents that Defendant's initial search plan does not include any reference to the Trump International Hotel or the Old Post Office Building in which the hotel is located. Three of the search terms listed above specifically refer to Trump, "OPO" and "post office" to capture records related to the Trump International Hotel or the Old Post Office Building, as they concern the FBI headquarters project. In paragraph 15, Plaintiff also provides an example of an email that they say would be missed using DOJ's search terms. Notwithstanding the fact that the legal standard for search adequacy is reasonableness, and reasonableness does not require capturing every possible iteration of a record, DOJ's proposed search terms would capture that email as long as it appeared somewhere within 30 words of the search term "FBI."

As DOJ has informed Plaintiff, DOJ estimates that the searches can be completed by June 15, 2019, and that, two weeks after the searches are completed, DOJ can propose a processing schedule.

Defendant's Position as to Plaintiff's Request for an Immediate Hearing

DOJ will continue to consult with Plaintiff as to any issues regarding DOJ's processing of the FOIA requests, including any issues raised by Plaintiff in this status report. However, the Court should deny Plaintiff's request for an immediate hearing regarding the adequacy of the searches that are being conducted by DOJ for any records responsive to Plaintiff's two FOIA

requests at issue in this case. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the searches before DOJ completes the searches and processes any responsive records, and Plaintiff's request for an immediate hearing on this issue contravenes this district's established procedures for FOIA cases.

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner. Plaintiff's suggestion that it should be allowed to insert itself into this process at this early stage is not only contravened by well-established precedent, but it is inefficient and counter-productive. The administrative process of searching for and processing records in response to a FOIA request is a dynamic, evolving, and complex process. Throughout the search process and records review processes, DOJ continually assesses whether supplemental or alternative search methods or search terms should be used or additional search custodians or records repositories should be searched and will initiate such additional searches as appropriate. For instance, if during the course of reviewing initial search results FOIA staff identify commonly-used terms or phrases employed by records custodians, which were not initially searched, it is routine procedure to then conduct a supplemental search for those newly-uncovered search terms. This ensures a robust and dynamic search which is informed by the records themselves. The initial search plan that DOJ shared with Plaintiff is just that – an initial plan – which will evolve as the search process continues to progress.

DOJ has been very accommodating in discussing its initial search plan with Plaintiff. After providing a first draft of the search plan to Plaintiff and listening to its concerns, DOJ made responsive adjustments based on Plaintiff's input. After providing Plaintiff with DOJ's updated second search plan, DOJ initiated its searches for any responsive records. However, the adequacy of the search itself is an agency determination which Plaintiff will have ample opportunity to challenge if, once the search is actually completed and DOJ provides a complete description of the entirety of that search process, Plaintiff still has objections to the search conducted by DOJ. DOJ must have the opportunity to complete its searches for and processing of any responsive records prior to litigating the adequacy of its searches. As previously mentioned, the search process has just begun, which is often the very reason FOIA cases are decided on motions for summary judgment at the end of the administrative search and records-processing process. DOJ should be permitted to conduct the searches and to complete its processing of any responsive records prior to any litigation as to the adequacy of the searches. At summary judgment, DOJ will of course establish the reasonableness of its search via agency declaration(s).

Third, Plaintiff's challenge to the adequacy of the searches being conducted by DOJ (including search terms) is not only premature, but also based on a false premise. "In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. *See Bigwood*, 132 F. Supp.3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search "is not

measured against the scope dictated by a requester's search instructions." *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff'd*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff's approach, "which would allow a requester to dictate, through search instructions, the scope of an agency's search," as undermining "the reasonableness test for search adequacy long adhered to in this circuit").

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding DOJ's processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff's request for an immediate hearing regarding the adequacy of DOJ's searches.

DATED: February 21, 2019

/s/ Cerissa Cafasso

Cerissa Cafasso

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

V.

U.S. DEPARTMENT OF JUSTICE,

Defendant.

Case No. 18-cv-2421 (RC)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT

As noted in the Joint Status Report filed by Defendant on February 21, 2019, *see* ECF No. 14, Plaintiff was not afforded an opportunity to see Defendant's statement before the report was filed.¹ Plaintiff, accordingly, provides the Court with this brief response to Defendant's

1 Plaintiff regrets the need to file this supplement to the status report. After first receiving Defendant's proposed searches on February 5, 2019, Plaintiff conveyed its concerns regarding the scope of the Defendant's proposed search to Defendant on February 8. By correspondence sent to Plaintiff on February 15, Defendant declined to substantively modify its proposed search and informed Plaintiff that it was moving forward with its own search. Plaintiff then informed counsel for the Defendant on Tuesday, February 19, at approximately 1:52 pm that it appeared the parties were at an impasse; that it intended to draft a plaintiff's statement outlining its concerns with Defendant's proposed search and requesting a status conference to discuss those issues; and that Plaintiff understood Defendant would also prepare a statement regarding its position on why the proposed search was appropriate and adequate. After Plaintiff provided a draft of the joint status report, including a draft of Plaintiff's statement, to Defendant's counsel on the morning of Thursday, February 21, counsel for the Defendant indicated that he was preparing a defendant's statement and would file the joint status report when he was done. Given that the parties were directed to file a joint status report, Plaintiff repeatedly requested that Defendant share its statement with Plaintiff so that Plaintiff could evaluate whether to make any adjustments to its statement in light of Defendant's position. Plaintiff's counsel also made clear that it would be available at any time that day, including after hours, to review Defendant's statement, finalize the submission, and file the joint status report. Plaintiff also offered to consent to a joint motion for a one-day extension for filing the joint status report if Defendant believed such an extension was necessary to complete any back-and-forth needed to finalize the joint status report. Counsel for the Defendant declined Plaintiff's requests and refused to share

statement—a statement which both in substance and in the manner in which Defendant chose to submit the information to the Court militate in favor of Plaintiff’s requested status conference.²

Defendant’s proposal that it conduct its planned search and that any dispute regarding the adequacy of that search be delayed for summary judgment briefing overlooks the primary concerns with proceeding on that course of action. First, it is incorrect to state that the issue of the adequacy of the search is not yet ripe. Defendant has taken a firm position that it would only conduct a search with specific parameters, and has declined to further negotiate in good faith regarding the search. Plaintiff requested a status conference in the interest of identifying the most efficient way to proceed in light of its view that Defendant’s proposed search is patently inadequate under the law. Given that Defendant has indicated a final position regarding the search, the federal rules would also permit Plaintiff simply to file a partial motion for summary judgment at this point regarding the adequacy of Defendant’s proposed search. Plaintiff continues to believe that a status conference would be beneficial in identifying the best way to proceed and address these differences regarding the search, but Plaintiff would be happy to file such a motion if the Court believes that it would benefit from briefing before considering this issue.

Defendant’s statement in advance of filing the joint status report at approximately 5:49 pm on February 21. Had Defendant instead provided the draft joint status report, including the Defendant’s statement, to Plaintiff’s counsel at 5:49 pm, there would have been ample time for Plaintiff to include any additional points, share any changes with Defendant, and file the joint status report before the end of the day. Plaintiff does not believe that counsel for the Defendant’s approach to this filing served the interests of this Court or the parties in the just and efficient resolution of this case.

² In addition, the final sentence of the Plaintiff’s Statement in the joint status report as filed by Defendant is incorrect. The final sentence, as drafted by Plaintiff and conveyed to Defendant, should read: “Despite Plaintiff’s request to review the final version of this Joint Status Report, Defendant has informed Plaintiff that it intends to withhold the Defendant’s Statement before filing. Plaintiff reserves the right to file a supplementary response to the Defendant’s Statement.”

Second, the only interest served by Defendant's proposed approach is delay. If Defendant commits resources and time to conducting its proposed search, and only then, after the search is complete and the documents are processed, the issue is addressed in conjunction with summary judgment briefing (which would necessarily also involve any other issues regarding the production, including the application of any exemptions), any resolution by the Court regarding the adequacy of the search will be delayed by months, if not years. Then, in the event that the Court agrees with Plaintiff that the search is inadequate, Defendant will have to undertake a new search and process additional documents, prolonging the case and potentially delaying the release of any non-exempt responsive documents by any additional period of months, potentially delaying any transparency or accountability for any inappropriate interference in the FBI headquarters procurement to benefit the president's personal financial interests until after the election in 2020. Resolving the issue of the search now, rather than only after the agency has already invested considerable time and agency resources in conducting its proposed but inadequate search, would serve the efficient resolution of the case for the parties and for the Court. The issues and arguments raised in the Defendant's Statement only underscore the importance of Plaintiff's request for a status conference to discuss this issue.

Defendant is generally correct that Plaintiff's requests "broadly seek[] records related to the FBI Headquarters project and the Trump Hotel or Trump Organization." *See* Joint Status Report at 8, ECF No. 14; Decl. of Cerissa Cafasso in Supp. of P.'s Response to Def.'s Statement, Exhibits A & B. However, that summary does not precisely characterize the nature of the request.

DOJ's proposed search terms ignore Plaintiff's specific request in the Hotel Communications FOIA. Although it is true that Plaintiff was generally seeking records about

whether and to what extent the president's financial interests in the Trump International Hotel influenced the decision not to relocate the FBI Headquarters, the request sought records wherein responsiveness was determined by communications with a limited number of persons communicating with DOJ in a non-governmental capacity. That portion of the request is thus, contrary to DOJ's position, not "overly broad," even without a subject-matter limitation, because there should be a limited number of responsive documents in the first instance. *See* Joint Status Report at 8, ECF No. 14. Nor is it correct that FOIA requires a subject-matter limitation, so long as it is clear what records the request seeks. *MuckRock LLC v. CIA*, No. 14-997, at *19-20, 2018 WL 1129713 (D.D.C. Feb. 28, 2018). The second portion of the request sought records containing one or more of six key words; contrary to DOJ's characterization, the request did not "propose" search terms but instead keyed responsiveness to the presence of one or more of those six terms. *See* Joint Status Report at 8, ECF No. 14. That is, the request by its plain terms seeks any communication of the identified custodians containing the six key terms; it likewise has no subject-matter limitation and DOJ's effort to impose one is improper.

Plaintiff did not intentionally mischaracterize DOJ's search plan, *see id.* at 9, and had Defendant shared its statement before filing, Plaintiff would have been able to clarify its concerns with regard to Defendant's proposed search. It remains true that none of the proposed search terms include a reference to the president's hotel. And requiring "Post Office" or "OPO" to exist in proximity to "FBI" still runs the foreseeable risk that a number of responsive records will be omitted from the search and subsequent review. *See id.* at 9.

Fundamentally, Defendant's statement and response to Plaintiff's request for a status conference are based on a false premise—it is Defendant, in its letter dated February 15, that has terminated negotiations with Plaintiff regarding the terms of the search, having instead chosen to

move forward with terms that are clearly contrary to Plaintiff's requests. Indeed, during discussions regarding the joint status report yesterday, February 21, Plaintiff offered to seek a two-week extension for the joint status report if counsel for DOJ was willing to engage in a further good-faith negotiation regarding the scope of the search that DOJ would conduct, and counsel for DOJ declined this offer. It is difficult to reconcile this decision with DOJ's assertion in its Defendant's statement that it has not reached a firm position regarding the scope of the search it has already initiated, absent intervention by the Court.

Defendant has elected to ignore Plaintiff's prompt expression of concern with regard to the agency's proposed search and instead intends to move forward with a search that is not designed to capture the records Plaintiff seeks. Before Defendant continues to dedicate resources to a flawed search, Plaintiff believes a status conference to discuss the issue and avoid further delay would be beneficial. As stated above, Plaintiff is prepared to move for partial summary judgment on the adequacy of the agency's proposed search if the Court would prefer briefing on the issue.

For the reasons stated above and in the Joint Status Report, Plaintiff reiterates its request that the Court order the parties to appear for a status conference on March 4, 2019, or on another date convenient for the Court.

DATED: February 22, 2019

Respectfully submitted,

/s/ Cerissa Cafasso

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**UNITED STATES DISTRICT COURT
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AMERICAN OVERSIGHT,

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Introduction

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6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's own FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff to reasonably ascertain exactly which records are being requested and to locate them." *United*

States Department of Justice Guide to the Freedom of Information Act, “Procedural Requirements” 22 (Sept. 4, 2013),

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8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by the FBI with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified FBI personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified FBI custodians over an identified time period.

¹ Eight persons are identified by name, with one person named twice to ensure a search for records in two positions he held during the responsive time period; one requested custodian is described by title; and one category of custodians included “anyone communicating on behalf of four of the requested positions.”

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an FBI employee could reasonably ascertain which agency records are sought and locate them. Both components of the request seek communications for a small set of specific FBI employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in DOJ's own FOIA guide, the FBI has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified FBI custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified FBI custodians and the White House Office from January 20, 2017, through the date of the search. Within that set, Plaintiff requested that the agency search for

records that contain one (or more) of sixteen search terms. While this request employs a longer list of search terms, it seeks a search only of that subset of communications that include both the identified FBI custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be limited reason for the FBI custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that FBI Director Christopher Wray and other senior FBI officials were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*,

705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and Defendant is refusing honor the requested method of search. The agency's proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant's proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president's hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. *See* Compl. ¶ 11 (listing search terms to include "Trump International Hotel," "TIH," "Post Office," and "OPO," among others). None of the FBI's proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies. As another deficiency in the agency's proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, "The White House had no position on consolidation," it is also possible that someone reporting out on the same meeting might say, "Kelly said they had no position on consolidation." American Oversight's requested search would capture the latter communication, but the FBI's proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after

Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

1. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on February 28, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

The FBI's Search Plan for Plaintiff's FOIA Requests

The first FOIA request at issue in this case (FOIA 1415577) seeks certain records between specified FBI officials and persons at the White House regarding the FBI headquarters consolidation project.

The second FOIA request (FOIA 1415579) includes two parts. The first part, which seeks certain records between specified DOJ officials and specified Trump Organization officials, does not expressly state a subject matter. The second part of this request, which seeks records to or from specified DOJ officials, does not identify any third parties and, although Plaintiff suggests various search terms as discussed below, the request does not expressly state a subject matter. The FBI interprets this request as seeking records pertaining to (a) communications between specified FBI individuals and specified individuals associated with the Trump Organization or the Trump Hotel regarding the FBI headquarters consolidation project, or (b) communications with specified FBI officials regarding the Trump Hotel.

The FBI has notified Plaintiff of the following search plan for the two FOIA requests at issue in this case. The FBI's expertise with its own records systems and the methods by which to search them has informed its search plan. To obtain any records responsive to the FOIA requests, the FBI is conducting a Sentinel Search for administrative files using the following list of search terms:

Headquarters Relocation,
FBI HQ Relocation,
Headquarters consolidation, OR
FBI HQ Consolidation.

The FBI will also conduct email searches of Director Wray, Former Director Comey, DD Bowdich, former DD McCabe, AD Richard Haley of Finance Division, and the UC for the HQ Program Management Office. The FBI will use the following search list of terms for these searches:

White House AND Consolidation,
White House AND Relocation,
@whp.eop.gov AND Consolidation,
@whp.eop.gov AND Relocation,
Trump AND Consolidation, OR
Trump AND Relocation.

If these email searches identify other custodians of records, the FBI will then follow up.

The FBI determined that these searches terms for the FOIA requests are reasonably calculated to locate all documents potentially responsive to the requests, without capturing an inordinate number of records that are unrelated to the subject matter of the requests. Many of the search terms suggested by Plaintiff (including “Post Office” and “consolidate*”) are so vague and general that use of such proposed terms on their own would likely result in locating many records unrelated to the subject matter of the FOIA requests. As a result, use of Plaintiff’s proposed terms would cause significant delays in conducting searches, reviewing records for responsiveness, and making determinations as to the application of any applicable FOIA Exemptions.

The FBI has informed Plaintiff that the FBI initiated a search for any potentially responsive records.

Defendant’s Position as to Plaintiff’s Request for an Immediate Hearing

The FBI will continue to consult with Plaintiff as to any issues regarding the FBI’s processing of the FOIA requests, including issues raised by Plaintiff in this status report. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of the search that is being conducted by FBI for any records responsive to Plaintiff’s FOIA requests. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status

report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the search before the FBI completes the search and processes any responsive records, and Plaintiff's request for an immediate hearing on this issue contravenes this district's established procedures for FOIA cases. "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner.

After providing Plaintiff with the FBI's search plan (including search terms), the FBI initiated its search for any responsive records. The FBI's expertise with its own records systems and the methods by which to search them has informed its search plans. The FBI should be permitted to conduct the search and complete its processing of any responsive records prior to any litigation as to the adequacy of the search.

Third, Plaintiff's challenge to the adequacy of the search being conducted by the FBI (including search terms) is not only premature, but also based on a false premise. "In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. *See Bigwood*, 132 F. Supp.3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search "is not measured against the scope dictated by a requester's search instructions." *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff'd*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff's approach,

“which would allow a requester to dictate, through search instructions, the scope of an agency’s search,” as undermining “the reasonableness test for search adequacy long adhered to in this circuit”).

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding the FBI’s processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of the FBI’s search.

DATED: February 21, 2019

/s/ Cerissa Cafasso

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Counsel for Defendant

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

V.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No. 18-cv-2422 (APM)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT

As noted in the Joint Status Report filed by Defendant on February 21, 2019, *see* ECF No. 14, Plaintiff was not afforded an opportunity to see Defendant's statement before the report was filed.¹ Plaintiff accordingly provides the Court with this brief response to Defendant's

1 Plaintiff regrets the need to file this supplement to the status report. After first receiving Defendant's proposed searches on Friday, February 1, 2019, Plaintiff conveyed its concerns regarding the scope of the Defendant's proposed search to Defendant on Monday, February 4. Defendant responded on Wednesday, February 13 and indicated that it declined to modify its proposed search. Plaintiff then informed counsel for the Defendant on Tuesday, February 19 that it appeared the parties were at an impasse; that it intended to draft a plaintiff's statement outlining its concerns with Defendant's proposed search and requesting a status conference to discuss those issues; and that Plaintiff understood Defendant would also prepare a statement regarding its position on why the proposed search was appropriate and adequate. After Plaintiff provided a draft of the joint status report, including a draft of Plaintiff's statement, to Defendant's counsel on the morning of Thursday, February 21, counsel for the Defendant indicated that he was preparing a defendant's statement and would file the joint status report when he was done. Given that the parties were directed to file a joint status report, Plaintiff repeatedly requested that Defendant share its statement with Plaintiff so that Plaintiff could evaluate whether to make any adjustments to its statement in light of Defendant's position. Plaintiff's counsel also made clear that it would be available at any time that day, including after hours, to review Defendant's statement, finalize the submission, and file the joint status report. Plaintiff also offered to consent to a joint motion for a one-day extension for filing the joint status report if Defendant believed such an extension was necessary to complete any back-and-forth needed to finalize the joint status report. Counsel for the Defendant declined Plaintiff's requests and refused to share Defendant's statement in advance of filing the joint status report at

statement—a statement which both in substance and in the manner in which Defendant chose to submit the information to the Court militate in favor of Plaintiff’s requested status conference.²

Defendant’s proposal that it conduct its planned search and that any dispute regarding the adequacy of that search be delayed for summary judgment briefing overlooks the primary concerns with proceeding on that course of action. First, it is incorrect to state that the issue of the adequacy of the search is not yet ripe. Defendant has taken a firm position that it would only conduct a search with specific parameters, and has declined to further negotiate in good faith regarding the search. Plaintiff requested a status conference in the interest of identifying the most efficient way to proceed in light of its view that Defendant’s proposed search is patently inadequate under the law. Given that Defendant has indicated a final position regarding the search, the federal rules would also permit Plaintiff simply to file a partial motion for summary judgment at this point regarding the adequacy of Defendant’s proposed search. Plaintiff continues to believe that a status conference would be beneficial in identifying the best way to proceed and address these differences regarding the search, but Plaintiff would be happy to file such a motion if the Court believes that it would benefit from briefing in considering this issue.

Second, the only interest served by Defendant’s proposed approach is delay. If Defendant commits resources and time to conducting its proposed search, and only then, after the search is

approximately 5:51 pm on February 21. Had Defendant instead provided the draft joint status report, including the Defendant’s statement, to Plaintiff’s counsel at 5:51 pm, there would have been ample time for Plaintiff to include any additional points, share any changes with Defendant, and file the joint status report before the end of the day. Plaintiff does not believe that counsel for the Defendant’s approach to this filing served the interests of this Court or the parties in the just and efficient resolution of this case.

² In addition, the final sentence of the Plaintiff’s Statement in the joint status report as filed by Defendant is incorrect. The final sentence, as drafted by Plaintiff and conveyed to Defendant, should read: “Despite Plaintiff’s request to review the final version of this Joint Status Report, Defendant has informed Plaintiff that it intends to withhold the Defendant’s Statement before filing. Plaintiff reserves the right to file a supplementary response to the Defendant’s Statement.”

complete and the documents are processed, the issue is addressed in conjunction with summary judgment briefing (which would necessarily also involve any other issues regarding the production, including the application of any exemptions), any resolution by the Court regarding the adequacy of the search will be delayed by months, if not years. Then, in the event that the Court agrees with Plaintiff that the search is inadequate, Defendant will have to undertake a new search and process additional documents, prolonging the case and potentially delaying the release of any non-exempt responsive documents by any additional period of months, potentially delaying any transparency or accountability for any inappropriate interference in the FBI headquarters procurement to benefit the president's personal financial interests until after the election in 2020. Resolving the issue of the search now, rather than only after the agency has already invested considerable time and agency resources in conducting its proposed but inadequate search, would serve the efficient resolution of the case for the parties and for the Court. The issues and arguments raised in the Defendant's statement only underscore the importance of Plaintiff's request for a status conference to discuss this issue.

Whether by accident or design, Defendant's proposed search targets a subject matter that is not actually what Plaintiff requested. Of course Defendant—the agency whose headquarters were considered for relocation—will have had general conversations regarding the “FBI Headquarters Consolidation Project.” Plaintiff's request instead targeted records that would inform the public of whether and to what extent the president's financial interest in the Trump International Hotel—located across the street from the J. Edgar Hoover Building—influenced the decision not to relocate the FBI Headquarters. This is demonstrated not only in the request language itself but throughout the body of the requests submitted to the Defendant. *See* Decl. of Cerissa Cafasso in Supp. of P.'s Response to Def.'s Statement, Exhibits A at 1–2 & B at 1–2

(“American Oversight seeks records to inform whether and to what extent the president’s personal financial interests influenced a multi-billion-dollar federal project with national security considerations.”). Defendant has missed this central point in its attempt to force a synopsis on the request. *See* Joint Status Report at 7, ECF No. 14 (“The [White House Communications FOIA request] seeks certain records between specified FBI officials and persons at the White House regarding the FBI headquarters consolidation project.”). Even where Defendant is closer to appropriately identifying the subject, the search terms it proposes are fundamentally flawed. Defendant alleges that it is seeking communications “regarding the Trump Hotel,” *see id.* at 8, but none of its search terms attempt to locate records that mention the hotel or the federally owned Old Post Office Building in which the hotel is located. Finally, the limited search Defendant proposes simply ignores the fact that the records requested in the Hotel Communications FOIA do not have such a subject-matter limitation, nor does FOIA require requests to have one. *MuckRock LLC v. CIA*, No. 14-997, at *19-20, 2018 WL 1129713 (D.D.C. Feb. 28, 2018).

Defendant has elected to ignore Plaintiff’s prompt expression of concern with regard to the agency’s proposed search and instead move forward with a search that is not designed to capture the records Plaintiff seeks. Before Defendant continues to dedicate resources to a flawed search, Plaintiff believes a status conference to discuss the issue and avoid further delay would be beneficial. As stated above, Plaintiff is prepared to move for partial summary judgment on the adequacy of the agency’s proposed search if the Court would prefer briefing on the issue.

For the reasons stated above and in the Joint Status Report, Plaintiff reiterates its request that the Court order the parties to appear for a status conference on February 28, 2019, or on another date convenient for the Court.

DATED: February 22, 2019

Respectfully submitted,

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Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

v.

OFFICE OF MANAGEMENT AND
BUDGET,

Defendant.

Civil Action No. 18-2424 (DLF)

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this status report pursuant to the Court's minute order of February 5, 2019.

Introduction

1. At issue are two Freedom of Information Act (FOIA) requests submitted by Plaintiff to Defendant, the Office of Management and Budget (OMB), on August 30, 2018, seeking records relating to the Federal Bureau of Investigation (FBI) Headquarters Consolidation Project. Plaintiff filed the Complaint on October 23, 2018, ECF No. 1; Defendant filed its Answer on December 7, 2018, ECF No. 7.

2. As previously reported, the parties are discussing the requests and Defendant's plan to search for potentially responsive records. On December 21, 2018, Defendant issued a letter to Plaintiff regarding Defendant's plan for processing the two FOIA requests, including search terms to be used. On January 29, 2019, Plaintiff provided Defendant with comments as to Defendant's search terms. On February 21, 2019, Defendant responded to Plaintiff's comments regarding the agency's proposed search.

3. The parties submit separate statements below regarding their respective positions and proposals for moving forward.

Plaintiff's Statement

4. At issue in this matter are two FOIA requests that made clear and specific requests for records related to the federal government's consideration of the relocation of the FBI Headquarters, the "Hotel Communications FOIA" request and the "White House Communications FOIA" request.

5. The parties have reached an impasse regarding the adequacy of Defendant's proposed search for records responsive to Plaintiff's requests. Defendant is refusing to run searches reasonably calculated to identify the records sought by these two requests. Instead, as explained more fully below, Defendant proposes to run a more limited search using proximity searches likely to exclude many responsive records. With respect to the Hotel Communications FOIA request, Defendant's proposed search ignores the plain terms of the request and consequently will not identify the document sought. Likewise, with respect to the White House Communications FOIA request, Defendant's proposed search is inadequate because it ignores Plaintiff's sixteen requested search terms and the proposals are patently incomplete and rely on searching for complex phrases that appear designed to miss relevant records. Furthermore, Defendant has not articulated a reasonable explanation as to why it will not conduct the searches necessary to identify and produce all responsive records.

6. The FOIA requires agencies to "make records promptly available to any person" "upon any request for records which . . . reasonably describes such records." 5 U.S.C. § 552(a)(3)(A). The Department of Justice's FOIA guide states, "The key to determining whether a request satisfies the ['reasonably describes'] requirement is the ability of agency staff

to reasonably ascertain exactly which records are being requested and to locate them.” *United States Department of Justice Guide to the Freedom of Information Act*, “Procedural Requirements” 22 (Sept. 4, 2013),

<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements.pdf>

(citations omitted).

7. In the “Hotel Communications FOIA,” American Oversight requested two categories of records from the agency from January 20, 2017, through the date of the search. First, Plaintiff requested records reflecting communications from specifically identified employees at OMB (“the OMB custodians”)¹ and “any individuals associated with the Trump Organization LLC or Trump Hotels, including but not limited to” fifteen named persons and one category of “anyone communicating from an email address ending with” one of four domain names. Compl. ¶ 15. Second, American Oversight requested all records reflecting communications with the identified OMB custodians “containing [at least one of six] search terms.” *Id.*

8. The terms of the Hotel Communications FOIA request seek a clearly identified set of agency records that can be readily located by OMB with a reasonable amount of effort. The first category of this request seeks records reflecting communications between specifically identified OMB personnel and specifically identified persons acting in non-governmental capacities for an identified timeframe. Similarly, the second category of this request seeks records reflecting all communications containing one (or more) of six identified terms for a small number of identified OMB custodians over an identified time period.

¹ American Oversight identified two employees by name and title—Director Mick Mulvaney and Deputy Director Russ Vought—and one category of custodians including “anyone communicating on behalf of” the three employees.

9. Based on the clear terms of each category of the Hotel Communications FOIA request, an OMB employee could reasonably ascertain which agency records are sought and locate them. Both components of the request seek communications for a small set of specific OMB employees over an identified timeframe, and further limits the records sought, the first by seeking only communications with a small set of specific, identified non-governmental persons; and the second by seeking only communications containing one (or more) of six specific, identified terms.

10. Notwithstanding the fact that there can be no doubt that the Hotel Communications FOIA reasonably describes the records sought, including as that requirement is defined in the United States Department of Justice's FOIA guide, OMB has refused to undertake a search to identify the requested records, and seeks to substitute instead a search of a more limited number of custodians filtered by a quite limited set of search terms. Defendant has provided no legitimate explanation for its refusal to search for the records actually sought by this request.

11. In the "White House Communications FOIA," American Oversight requested records reflecting communications between or among any person at the White House Office and the identified OMB custodians "regarding the FBI headquarters consolidation project." Compl. ¶ 10. American Oversight further requested that the agency use sixteen specified terms to help identify responsive records. *Id.* ¶ 11.

12. The White House Communications FOIA request likewise reasonably describes the records sought allowing any agency employee to ascertain and locate all responsive records. First, the request is limited to records reflecting communications between a limited number of specifically identified OMB custodians and the White House Office from January 20, 2017,

through the date of the search. Within that set, Plaintiff requested that the agency search for records that contain one (or more) of sixteen search terms. While this request employs a longer list of search terms, it seeks a search only of that subset of communications that include both the identified OMB custodians and the White House Office.

13. Notwithstanding the clear language of the request, Defendant is again declining to undertake a search reasonably calculated to identify records responsive to the White House Communications FOIA request. Although American Oversight specifically requested that the identified search terms be used, the agency is refusing to do so based purely on speculation, blindly claiming that—despite the request’s clear limitations on (a) the custodians to be searched; (b) the correspondents whose communications are responsive; (c) the use of one of sixteen identified search terms; and (d) the time period to be searched—it believes the potential yield of potentially responsive records to be reviewed might be too burdensome.

14. The sixteen search terms identified relate to the president’s interest in the Old Post Office building and the FBI headquarters procurement process being run by the General Services Administration. In a properly-run federal procurement process, there would be very limited reason for the OMB custodians to be communicating with the White House Office regarding those subjects, and it would be reasonable to expect few if any responsive records. Thus the agency’s refusal to run the search as requested raises more concerns than it seeks to address: surely it cannot be that Defendant is suggesting that Director Mulvaney and Deputy Director Vought were communicating with the White House Office and referencing the “Trump International Hotel” (one of the requested search terms) with such frequency that the resulting volume of records would be overly burdensome for the agency to review.

15. “[T]he adequacy of a FOIA search is generally determined . . . by the appropriateness of the methods used to carry out the search.” *Weisberg v. U.S. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). American Oversight requested specific searches and Defendant is refusing honor the requested method of search. The agency’s proposed search terms are inadequate and appropriate. First, with respect to the Hotel Communications FOIA request, as explained above, the proposed search simply fails to account for the records actually sought by the request. With respect to the White House Communications FOIA request, Defendant’s proposed search terms are not reasonably calculated to identify the requested records, but instead are overly limited, defy common sense, and fail to account for how officials would be likely to communicate in responsive communications. For example, one of the aspects on which the request clearly seeks records is communications discussing whether the presence of the president’s hotel across from the FBI Headquarters at all influenced the decision not to relocate the agency. See Compl. ¶ 11 (listing search terms to include “Trump International Hotel,” “TIH,” “Post Office,” and “OPO,” among others). None of OMB’s proposed search terms include any reference to the Trump International Hotel or the federally owned Old Post Office Building that the hotel occupies, except to the extent that “Trump” might be written within 25 words of “FBI headquarters” or “FBI HQ.” As another deficiency in the agency’s proposed search, the required combinations of terms do not reflect how persons would naturally discuss this project. While it is possible that someone reporting out on a meeting at the White House might say, “The White House had no position on the FBI headquarters consolidation project,” it is also possible that someone reporting out on the same meeting might say, “Kelly said they had no position on consolidation.” American Oversight’s requested search would capture the latter communication, but OMB’s proposed search does not.

16. Plaintiff's interest is in getting copies of non-exempt material promptly as required by FOIA and not in delay and protracted processing by the agency, and so Plaintiff remains open to undertaking an informed discussion regarding narrowing if necessary after Defendant has undertaken an initial search. As Plaintiff has demonstrated repeatedly in other matters involved in FOIA litigation and in FOIA processing discussions with agencies, if the requested searches yield an overly burdensome number of records for Defendant to review, Plaintiff would be happy to engage in a negotiation to narrow the records to be reviewed within that set. However, any narrowing discussions can only be undertaken in an informed manner with actual information regarding the results of initial searches—for instance, if one search term is resulting in numerous, inapposite hits, Plaintiff would of course be willing to engage in discussions with Defendant. At this point, however, Plaintiff believes that the request is not overly burdensome as drafted and maintains that Defendant should search for the records as requested. Any suggestion otherwise is simply uninformed speculation at this point.

17. In light of this impasse and because it would not serve the interests of Plaintiff, Defendant, or the Court for Defendant to proceed with its proposed search before these clear insufficiencies are addressed, Plaintiff requests that the Court order them to appear for a status conference on March 5, 2019, or on another date convenient for the Court. Plaintiff has not had an opportunity to review Defendant's Statement, and reserves the right to file a supplementary response.

Defendant's Statement

Defendant's Search Plan for Plaintiff's FOIA Requests

The first FOIA request at issue in this case (OMB 2018-527) seeks certain records between specified OMB officials and persons at the White House regarding the FBI headquarters consolidation project. Although Plaintiff proposes that the search include documents with one or more of sixteen search terms, such as "consolidate*" or "Post Office," OMB determined that use of these terms on their own would be overly broad and would unnecessarily capture many records that are unrelated to the FBI headquarters consolidation project. As a consequence, use of Plaintiff's proposed terms would cause significant delays in locating and processing records. OMB used as search terms any of the following for emails with any participant ending in "who.eop.gov":

"FBI headquarters consolidation project,"
"FBI" (w/25) "Headquarters," OR
"FBI HQ."

OMB has estimated that there are 62 records potentially responsive to this request.

The second request (OMB 2018-528) consists of two parts. The first part, which seeks certain records between specified OMB officials and fifteen specified Trump Organization officials, does not expressly state a subject matter and thus is vague and overly broad. OMB interprets the first part of the request as seeking records pertaining to the FBI headquarters consolidation project and the Trump Hotel or the Trump Organization. OMB used the same search terms listed above, except that OMB replaced the "who.eop.gov" limitation with any of the names of individuals and email domains listed in column B of the table included in this request.

The second part of this request, which seeks records to or from specified OMB officials, does not identify any third parties and, although Plaintiff proposes search terms as discussed below, the request does not expressly state a subject matter, and thus it is confusing and overly broad. OMB interprets the second part of this request as seeking records pertaining to the FBI headquarters consolidation project and the Trump Hotel or the Trump Organization. Although Plaintiff proposes that the search include documents with one or more of six search terms (including "Post Office"), OMB determined that use of these terms, combined with the absence of any third parties or subject-matter, would be overly broad and would unnecessarily capture many records that are unrelated to the FBI headquarters consolidation project. As a consequence, use of Plaintiff's suggested terms would cause significant delays in locating and processing records.

OMB has estimated that there are 77 records potentially responsive to this request.

OMB's expertise with its own records systems and the methods by which to search them has informed its search plans. The agency's searches for both requests (OMB 2018-527 and OMB 2018-528) are reasonably calculated to locate all documents potentially responsive to the requests, without capturing voluminous records that are unrelated to the requests.

OMB estimates that it can process and release all responsive records by April 2, 2019.

Defendant's Position as to Plaintiff's Request for an Immediate Hearing

OMB will continue to consult with Plaintiff as to any issues regarding OMB's processing of the FOIA requests, including issues discussed by Plaintiff in this statute report. However, the Court should deny Plaintiff's request for an immediate hearing regarding the adequacy of the

searches that are being conducted by OMB for any records responsive to Plaintiff's two FOIA requests at issue in this case. First, to the extent that Plaintiff now seeks affirmative relief, Plaintiff should be required to follow normal motion practice, rather than seeking relief in the guise of a joint status report. Second, even if Plaintiff were to file such a motion, it would be premature for the parties to litigate the adequacy of the searches before OMB completes the searches and processes any responsive records, and Plaintiff's request for an immediate hearing on this issue contravenes this district's established procedures for FOIA cases. "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F. Supp. 2d 6, 12 (D.D.C. 2009). Summary judgment in a FOIA case is most appropriate after the agency has finished producing all responsive, non-exempt information to the FOIA petitioner.

After providing Plaintiff with OMB search plan (including search terms), OMB initiated its searches for any responsive records. OMB's expertise with its own records systems and the methods by which to search them has informed its search plans.

OMB estimates that it can process and release all responsive records by April 2, 2019. OMB should be permitted to conduct the searches and to complete its processing of any responsive records prior to any litigation as to the adequacy of the searches. At summary judgment, OMB will of course establish the reasonableness of its search via agency declaration(s).

Third, Plaintiff's challenge to the adequacy of the searches being conducted by OMB (including search terms) is not only premature, but also based on a false premise. "In general, a FOIA petitioner cannot dictate the search terms for his or her FOIA request." *Bigwood v. U.S. Dep't of Def.*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015) (citing *Physicians for Human Rights v. Dep't of Def.*, 675 F. Supp. 2d 149, 164 (D.D.C. 2009)). Rather, a federal agency has discretion

in crafting a list of search terms that it believes to be reasonably tailored to uncover documents responsive to the FOIA request. *See Bigwood*, 132 F. Supp.3d at 140 (citing *Physicians for Human Rights*, 675 F. Supp. 2d at 164). Similarly, the reasonableness of a search “is not measured against the scope dictated by a requester’s search instructions.” *McClanahan v. U.S. Dep’t of Justice*, 204 F. Supp. 3d 30, 44 (D.D.C. 2016), *aff’d*, 712 Fed. Appx. 6 (D.C. Cir. 2018); *see also Mobley v. CIA*, 806 F.3d 568, 582 (D.C. Cir. 2015) (rejecting plaintiff’s approach, “which would allow a requester to dictate, through search instructions, the scope of an agency’s search,” as undermining “the reasonableness test for search adequacy long adhered to in this circuit”).

For all of these reasons, the Court should allow the parties to continue discussing any issues regarding OMB’s processing of the FOIA requests, including any issues raised by Plaintiff in this status report, and to file a joint status report in thirty days. However, the Court should deny Plaintiff’s request for an immediate hearing regarding the adequacy of OMB’s searches.

DATED: February 21, 2019

/s/ Hart W. Wood

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN OVERSIGHT,

Plaintiff,

V.

OFFICE OF MANAGEMENT & BUDGET,

Defendant.

Civil Action No. 18-2424 (DLF)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT

As noted in the Joint Status Report filed by Defendant on February 21, 2019, *see* ECF No. 12, Plaintiff was not afforded an opportunity to see Defendant's statement before the report was filed. Plaintiff accordingly provides the Court with this brief response to Defendant's statement.¹

Plaintiff regrets the need to file this supplement to the status report. After first receiving Defendant's proposed searches on December 21, 2018, Plaintiff conveyed its concerns regarding the scope of the Defendant's proposed search to Defendant on January 29, 2019 (promptly after Defendant reopened after it experience a lapse in funding from December 22, 2018 through January 25, 2019). Plaintiff received no further communication from Defendant, and informed counsel on Tuesday, February 19, that if it did not receive a response to its concerns regarding the search then Plaintiff was preparing to file separate statement and request a status conference.

¹ The final sentence of the Plaintiff's Statement in the joint status report as filed by Defendant is incorrect. The final sentence, as drafted by Plaintiff, should read "Despite Plaintiff's request to review the final version of this Joint Status Report, Defendant has informed Plaintiff that it intends to withhold the Defendant's Statement before filing. Plaintiff reserves the right to file a supplementary response to the Defendant's Statement."

Defendant responded to Plaintiff's concerns for the first time on Thursday, February 21, informing Plaintiff that Defendant and that it had already conducted its own search despite Plaintiff's concerns, identified potentially responsive records, and would produce any responsive records by April 2, 2019. Approximately half an hour after receiving OMB's response, Plaintiff provided a draft of the joint status report, including a draft of Plaintiff's statement, to Defendant's counsel. After providing the draft joint status report and Plaintiff's statement, counsel for the Defendant indicated that he was preparing a Defendant's statement and would file the joint status report when he was done.

Given that the parties were directed to file a joint status report, Plaintiff repeatedly requested that Defendant share the Defendant's statement with Plaintiff so that Plaintiff could evaluate whether to make any adjustments to its statement in light of Defendant's position. Plaintiff's counsel also made clear that it would be available at any time that day, including after hours, to review Defendant's statement, finalize the submission, and file the joint status report. Plaintiff also offered to consent to a joint motion for a one-day extension for filing the joint status report if Defendant believed such an extension was necessary to complete any back-and-forth necessary to complete the joint status report. Counsel for the Defendant declined Plaintiff's request and refused to share Defendant's Statement in advance of filing, and filed the joint status report at approximately 5:52 PM on February 21. Had Defendant instead provided the draft joint status report, including the Defendant's statement, to Plaintiff's counsel at 5:52 PM, there would have been ample time for Plaintiff to include any additional points, share any changes with Defendant, and file the joint status report before the end of the day. Plaintiff does not believe that counsel for the Defendant's approach to this filing served the interests of this Court or the parties in the just and efficient resolution of this case.

It remains Plaintiff's view that Defendant's search is patently inadequate under the law. Whether by accident or design, Defendant's search targets a subject matter that is not actually what Plaintiff requested. Of course Defendant—the agency responsible for aligning federal programs with the federal budget—has an equity in the FBI Headquarters Consolidation Project. Plaintiff's request instead targeted records that would inform the public of whether and to what extent the president's financial interest in the Trump International Hotel—located across the street from the J. Edgar Hoover Building—influenced the decision not to relocate the FBI Headquarters. This is demonstrated not only in the request language itself but throughout the body of the requests submitted to the Defendant. Defendant is generally correct that Plaintiff's requests broadly seek records related to the FBI Headquarters project and the Trump Hotel or Trump Organization. *See* Joint Status Report at 9, ECF No. 12. However, that summary does not precisely characterize the nature of the request.

OMB's search terms ignore Plaintiff's specific request in the Hotel Communications FOIA. Although it is true that Plaintiff was generally seeking records about whether and to what extent the president's financial interests in the Trump International Hotel influenced the decision not to relocate the FBI Headquarters, the language of the request specifically sought records wherein responsiveness was determined by communications with a limited number of persons communicating with OMB in a non-governmental capacity. That portion of the request is thus, contrary to OMB's position, not "overly broad," even without a subject matter limitation, because there should be a limited number of responsive documents in the first instance. *See* Joint Status Report at 8, ECF No. 12. Moreover, the limited search Defendant proposes simply ignores the fact that the records requested in the Hotel Communications FOIA do not have such a subject-matter limitation, nor does FOIA require requests to have one. *See MuckRock LLC v.*

CIA, No. 14-997, at *19-20, 2018 WL 1129713 (D.D.C. Feb. 28, 2018). The second portion of the request sought records containing one or more of six key words; contrary to OMB's characterization, the request did not "propose" search terms but instead keyed responsiveness to the presence of one or more of those six terms. *See id.* at 9. The search already conducted by Defendant thus remains—as Plaintiff expressed to Defendant over a month ago—overly restrictive and ill-designed to capture the records actually requested.

Having now had the opportunity to review Defendant's statement and proposed production schedule, Plaintiff withdraws its request for a status conference. However, as Plaintiff maintains that Defendant's search remains unreasonable and that, as a result, the anticipated production will likely be inadequate, Plaintiff respectfully submits the following proposed schedule for further proceedings in this case following Defendant's final production of documents responsive to its inadequate search on April 2, 2019:

1. Defendant shall file its motion for summary judgment on or before May 3, 2019.
2. Plaintiff shall file its opposition and any cross-motion for summary judgment on or before May 31, 2019.
3. Defendant shall file its reply and cross-opposition on or before June 21, 2019.
4. Plaintiff shall file its reply on or before July 12, 2019.²

Plaintiff respectfully requests that the Court adopt this proposed schedule. Plaintiff also remains available for a status conference if the Court concludes one would be appropriate.

² Plaintiff notes that this reasonable production schedule still results in a significant delay for the production of documents responsive to Plaintiff's requests.

DATED: February 22, 2019

Respectfully submitted,

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